79-1170

No.

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1979

McGRAW-EDISON COMPANY, HALO LIGHTING DIVISION OF McGRAW-EDISON COMPANY PROFIT SHARING AND RETIREMENT TRUST, and RAYMOND H. GIESECKE, JOHN LOGAN, EDWARD BLETTNER, EDWARD J. WILLIAMS, DAN T. THOMSON and EXCHANGE NATIONAL BANK OF CHICAGO as Trustees of Halo Lighting Division of McGraw-Edison Company Profit Sharing and Retirement Trust,

Petitioners,

vs.

ROBERT S. FREMONT, RONALD L. McCARTHY and HENRY W. DYBAL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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January 29 1980

The Scheffer Press, Inc.—(312) 263-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

McGRAW-EDISON COMPANY, HALO LIGHTING DIVISION OF McGRAW-EDISON COMPANY PROFIT SHARING AND RETIREMENT TRUST, and RAYMOND H. GIESECKE, JOHN LOGAN, EDWARD BLETTNER, EDWARD J. WILLIAMS, DAN T. THOMSON and EXCHANGE NATIONAL BANK OF CHICAGO as Trustees of Halo Lighting Division of McGraw-Edison Company Profit Sharing and Retirement Trust,

Petitioners,

vs.

ROBERT S. FREMONT, RONALD L. McCARTHY and HENRY W. DYBAL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners McGraw-Edison Company, Halo Lighting Division of McGraw-Edison Company Profit Sharing and Retirement Trust, and Raymond H. Giesecke, John Logan, Edward Blettner, Edward J. Williams, Dan T. Thomson and Exchange National Bank of Chicago as

Trustees of Halo Lighting Division of McGraw-Edison Company Profit Sharing and Retirement Trust respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 27, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not yet been reported, appears in the Appendix hereto. (A. 1a-16a).* The findings and opinion of the District Court for the Northern District of Illinois also appear in the Appendix. (A. 17a-24a).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 27, 1979. A timely petition for rehearing was denied on October 31, 1979. This petition is being timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether aiding and abetting a fiduciary's breach of his duty to a pension plan is prohibited by Sections 404 and 409 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1104 and 1109.

2. Whether Section 203 of ERISA, 29 U.S.C. §1053, applies to every claim for pension trust benefits made by someone employed as of January 1, 1976, which is acted upon by the trust administrators after that date.

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* Parenthetical page references preceded by the letter "A" refer to the pages of the printed Appendix hereto.

STATEMENT OF THE CASE

This action arose out of thefts by the plaintiffs in this proceeding, and the respondents herein, Robert S. Fremont, Ronald L. McCarthy and Henry W. Dybal of property of their employer, the McGraw-Edison Company ("Company"), and the resulting loss of the Respondents' interest in the Company's Profit Sharing and Retirement Trust (the "Plan"). Before the loss was declared by the trustees of the Plan, the petitioners herein, the Respondents, asserting jurisdiction under 29 U.S.C. §1132, filed suit and alleged that their Plan interests had been protected from loss by Section 203 of ERISA, 29 U.S.C. §1053. (A. 2a). The Petitioners denied that the Respondents had any such protected interests and alleged, as a counterclaim against Fremont and McCarthy, that the concealment of their thefts constituted a breach by Fremont, who was a trustee of the Plan, of his duty as a fiduciary under ERISA Section 404, 29 U.S.C. §1104, and that Fremont and McCarthy, who aided and abetted the breach, were liable under Section 409 of ERISA, 29 U.S.C. §1409, for losses sustained by the Plan as a consequence of the breach. (A. 12a).

Fremont and McCarthy were employees of the Company who, during October and November, 1975, stole valuable property from the Company. (A. 3a). Shortly after the thefts, Fremont left the Company and formed a new business in competition with the Company. (A. 3a). McCarthy left the Company on May 3, 1976 and joined Fremont. (A. 3a). Their thefts were not uncovered, however, until August, 1976. (A. 3a).

At the time of their thefts, Fremont and McCarthy were participants in the Plan and Fremont was a trustee

of the Plan. (A. 2a). Section III(D) of the Plan provided that:

> "No part of the shares of any of the following participants shall become vested in them: (i) a participant who is discharged by reason of dishonesty, theft, embezzlement or disclosure of trade secrets or who voluntarily terminates his employment with the Company after having committed such acts." (A. 4a).

The Petitioners' declaration that the Respondents' interests in the Plan had been lost was based on the explicit terms of Section III(D) of the Plan and the Respondents' thefts.

The Respondents contended, however, that Section 203 of ERISA negated Section III(D) of the Plan and entitled them to pension benefits regardless of their thefts.* ERISA Section 203, which became effective January 1, 1976, provides in part that:

> "Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable. . . ."

29 U.S.C. §1053(a). The Respondents urged that the declaration of their loss was tantamount to a forfeiture of vested rights prohibited by Section 203.

Independent of the vesting provisions of Section 203, ERISA imposed duties upon fiduciaries of pension plans.

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* Respondent Dybal also stole property from the Company and then left the Company to join Fremont. (A. 3a). Dybal's loss of his Plan interest was confirmed by both the District Court and the Court of Appeals, as was the loss by Fremont of his interest in the Plan, and neither Fremont's nor Dybal's loss is a subject of this petition.

Section 404 of ERISA requires that a fiduciary ". . . discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries, ..." 29 U.S.C. §1104(a)(1)(A)(i). In the event this fiduciary duty is breached, personal liability is expressly imposed on the fiduciary for any loss resulting to the plan from the breach. ERISA Section 409, 29 U.S.C. §1104(a).

The Petitioners claimed that Fremont's concealment of the Respondents' thefts, which would have resulted in the allocation of their Plan shares among the other Plan participants if promptly disclosed, constituted a breach of Fremont's fiduciary duty under Section 404 of ERISA as a trustee of the Plan. (A. 12a). Petitioners further claimed that Fremont and McCarthy, who aided and abetted the breach, were liable to the Plan under Section 409 of ERISA for any losses resulting from the breach. (A. 12a).

The District Court held, on cross-motions for summary judgment, that neither Fremont nor Dybal had any interest in the Plan which Section 203 of ERISA might affect. (A. 22a, 23a). The District Court further held that McCarthy's Plan interest had not been lost because, by the time his loss was declared, Section III(d) of the Plan had been negated by Section 203. (A. 21a) Finally, the District Court held that the Petitioners had failed to state a claim for breach of fiduciary duty under Sections 404 and 409 of ERISA against either Fremont or McCarthy on the ground that enforcement of that duty would indirectly violate Section 203. (A. 24a).

The Court of Appeals affirmed the District Court's holdings that neither Dybal nor Fremont had an interest

in the Plan protected by Section 203 of ERISA from loss. (A. 9a and 16a). The Court of Appeals also affirmed that McCarthy had such a protected interest because he had been employed as of January 1, 1976, his loss was declared after that date and he had been employed by the Company for more than ten years. (A. 11a). The Court of Appeals, however, reversed the dismissal of the Petitioners' counterclaim against Fremont and held that a claim for breach of fiduciary duty under ERISA had been stated against Fremont for his concealment of the thefts. (A. 13a). With regard to McCarthy's role in aiding and abetting that breach, the Court of Appeals held that aiding and abetting such a breach was not a violation of ERISA. (A. 14a).

REASONS FOR GRANTING THE WRIT

I. THE ISSUE OF LIABILITY UNDER ERISA FOR AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY IS AN IMPORTANT QUESTION OF FIRST IMPRESSION UNDER THE STATUTE.

The Court of Appeals concluded, in answer to what it acknowledged to be a "close" question, that aiding and abetting a breach of fiduciary duty was not prohibited by Sections 404 and 409 of ERISA. 29 U.S.C. §§1104 and 1109.* (A. 14a) In effect, the Court of Appeals, contrary to accepted principles of statutory construction, limited the remedies available under ERISA for a breach of fiduciary duty to an action against the fiduciary alone and thus absolved persons who knowingly and substantially assisted the breach from liability for their actions. Such a limitation seriously undermines the Congressional intent expressed in ERISA to protect ". . . the interests of participants in employee benefits plans . . ." by ". . . providing for appropriate remedies, sanctions and ready access to the Federal courts." ERISA §2(b), 29 U.S.C. §1001(b). Unless this Court corrects the Court of Appeals' limited interpretation of Sections 404 and 409, the decision below will stand as authority for two propositions, to wit: that conduct not expressly prohibited by

* Section 404 of ERISA requires, in relevant part, that a fiduciary ". . . shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . ." 29 U.S.C. §1053(a)(1). If these duties are breached, then the fiduciary ". . . shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, ..." ERISA §409(a), 29 U.S.C. §1109(a).

ERISA is permitted and that the fiduciary standards of ERISA are of only secondary importance to the vesting provisions of ERISA. The propositions are contrary to the purpose underlying ERISA.

The heart of the Petitioners' breach of fiduciary duty counterclaim against Fremont and McCarthy is the fact that if they had not concealed their thefts until after January 1, 1976, the effective date of Section 203 of ERISA, then their shares in the Plan would have been allocated among the other Plan participants before Section 203 became effective. (A. 12a). By concealing their thefts, Fremont and McCarthy sought to avoid this allocation and cause their Plan shares to be distributed to them. Yet, Fremont, as a trustee of the Plan, was caught between his fiduciary duty to the Plan to reveal facts which would have preserved the Plan's assets and his desire to save the Respondents' Plan shares.

The Court of Appeals recognized that Fremont freed himself from his quandry by breaching his fiduciary duty to the Plan and that Fremont could be held liable for any loss resulting from that breach under Section 409 of ERISA. (A. 13a) It is undisputed that McCarthy aided and abetted that breach and that his actions seriously damaged the Plan. However, the Court of Appeals refused to recognize in Sections 404 and 409 of ERISA a prohibition against such aiding and abetting. By so refusing, the court below ignored the plain direction of Congress to provide ". . . appropriate remedies, sanctions, and ready access to the Federal courts" to protect the interests of participants in employee benefit plans. 29 U.S.C. §1001(b).

Moreover, the reasons given by the Court of Appeals for its refusal to imply a needed remedy under ERISA evidence a disturbing tilt toward a narrow and restrictive

interpretation of ERISA. While it is true that Sections 404 and 409 do not expressly prohibit aiding and abetting a violation of those sections, courts have consistently implied prohibitions against aiding and abetting wrongful acts where such a prohibition furthers the Congressional purpose underlying the statute in question. For example, while §10(b) of the Securities Act of 1934, 15 U.S.C. §78(j)(b), does not expressly prohibit aiding and abetting a securities fraud, such a prohibition has been implied in that section. *See, e.g., Rolf* v. *Blyth Eastman Dillon & Co., Inc.*, 570 F.2d 38 (2d Cir. 1978), *cert. den.* 439 U.S. 1039 (1979). As expressed in the seminal case on civil liability for aiding and abetting a securities fraud, the prohibition was implied in §10(b) because it implemented the broad and remedial purpose of the 1934 Act—the protection of investors. *Brennan* v. *Midwestern United Life Ins. Co.*, 259 F.Supp. 673, 680-81 (N.D. Ind. 1966), *aff'd.* 417 F.2d 147 (7th Cir. 1969), *cert. den.* 387 U.S. 989 (1970). Similarly, the implication of a prohibition against aiding and abetting a breach of fiduciary duty in Sections 404 and 409 of ERISA would implement the broad and remedial purpore of ERISA—the protection of participants in employee benefit plans. The Court of Appeals' unwillingness to recognize the implied prohibition against aiding and abetting frustrates that purpose and creates a dangerous precedent that ERISA may only be narrowly and restrictively construed.

The infirmity of the Court of Appeals' decision in respect to failing to recognize the prohibition is underscored by its acknowledgment that aiding and abetting a breach of fiduciary duty is prohibited at common law. (A. 14a). ERISA was not intended to supplant the common law of trusts; rather, it adopted that common law

and supplemented it with specific prohibitions. *Eaves* v. *Penn*, 587 F.2d 453 (10th Cir. 1978) and *Marshall* v. *Kelly*, 465 F.Supp. 341 (W.D. Okl. 1978). However, the Court of Appeals' refusal to imply into ERISA a prohibition and remedy which existed at common law suggests that ERISA is a new and unique body of law which is divorced from the common law. This suggestion is directly refuted by the Congressional purpose underlying ERISA, as recognized in *Eaves, supra,* and *Kelly, supra.* Yet, unless this Court reviews the lower court's decision, that inaccurate suggestion may become a leading precedent in the field of ERISA interpretation.

The Court of Appeals assumed that its decision was required by a potential conflict among Sections 404, 409 and 203 of ERISA. (A. 14a). This supposed conflict stems from the fact that the loss caused the Plan by the instant breach of fiduciary duty would equal the vested plan benefits paid to McCarthy.* This "interrelationship" of vested benefits, which are protected by Section 203, and the breach of the fiduciary duty, which is governed by Sections 404 and 409, caused the Court of Appeals to withhold the remedy sought by Petitioners herein.

However, the fact that the amount lost as a result of the breach of fiduciary duty would equal the amount of McCarthy's Plan share is irreleyant in determining the application of §§404 and 409 to McCarthy. The fiduciary provisions of ERISA are equal to and separate from the vesting provisions of ERISA. Moreover, construing Sections 404 and 409 in a fashion that would conflict with Section 203 (as the Court of Appeals did) is not permitted where by their express terms they are separate from one another. *See, e.g., Bailey* v. *U.S.*, 511 F.2d 540 (Ct. Cls. 1975), and *Montgomery Charter Service, Inc.* v. *Washington Metropolitan Area Transit Commission,* 325 F.2d 230 (D.C. Cir. 1963).

* This concern arises only if McCarthy's pension interest was not lost under Section III(D) of the Plan when he committed his theft; that issue is discussed, *infra.*

Yet, the Court of Appeals created a conflict among the sections of ERISA where none existed. It then resolved the conflict by requiring that because the amount subject to recovery for aiding and abetting a violation of Section 404 represents the amount to which the vesting provisions of Section 203 apply the violation of Section 404 must go unredressed. This construction renders Section 404 a nullity whenever Section 203 is involved.

There are few cases which address the obligations and liabilities of a fiduciary under ERISA; there are no cases which address the liability under ERISA for aiding and abetting a breach of a fiduciary's duties. This is an important area of the law, as is evidenced by the massive Congressional effort which culminated in the ERISA legislation. The Court of Appeals' erroneous interpretation of Sections 404 and 409, in such a new and signifiicant area of law, creates a dangerous precedent which must be corrected and justifies the grant of certiorari to review the judgment below.

II. THE COURT OF APPEALS' DECISION REGARDING THE APPLICABILITY OF SECTION 203 OF ERISA CONFLICTS WITH THE DECISIONS OF OTHER LOWER COURTS AS TO THE APPLICATION OF ERISA TO PENSION BENEFIT CLAIMS.

Section 203(a) of ERISA provides that a pension plan must provide . . . "that an employee's right to his normal retirement benefit is nonforfeitable. . . ." 29 U.S.C. §1053 (a). The Court of Appeals concluded that Section 203 was

applicable to McCarthy's pension claim because, in part, the Petitioners' declaration of his loss was made after January 1, 1976, the date when Section 203 became effective. (A. 9a-11a).* However, the acts which were determinative of McCarthy's interest under the Plan—his thefts—occurred before Section 203 became effective. Thus, the Court of Appeals focused upon the date when the participant's loss was declared, rather than on the date of the participant's acts which triggered the loss, in determining the applicability of a provision of ERISA. This focus conflicts with other lower court decisions which have found the date of the participant's determinative act to be dispositive of the question of the applicability of ERISA to a pension claim.

For example, in both *Finn* v. *Chicago Newspaper Publishers' Association-Drivers Union Pension Fund,* 432 F.Supp. 1178 (N.D. Ill. 1977) and *Keller* v. *Graphic Systems of Akron, Inc.,* 422 F.Supp. 1005 (N.D. Ohio 1976), the district courts, when determining the applicability of ERISA to a claim for pension benefits, looked to the date of the act taken by the employee which disqualified him from plan benefits and not to the date of the assertion of or response to the claim. Similarly, in *Reuther* v. *Trustees of Trucking Employees, etc.,* 575 F.2d 1074 (3rd Cir. 1978) and *Bacon* v. *Wong,* 445 F.Supp. 1189 (N.D. Cal. 1978), the courts looked to the dates of the challenged acts, and not the date when the pension trustees declared the impact of those acts, to determine the applicability of ERISA.

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* The lower court also held that McCarthy had to have been employed on or after January 1, 1976 by the Company and for a period of ten or more years to have Section 203 apply to his Plan interest.

The above-cited decisions support the Petitioners' contention that Section 203 of ERISA could not even arguably protect McCarthy's interest in the Plan because McCarthy's thefts, the acts which caused that interest to be lost, occurred well before Section 203 became effective. Yet, contrary to the holdings of *Reuther, Finn, Keller* and *Wong, supra,* the Court of Appeals adopted the date of the formal declaration of McCarthy's loss as the critical date for Section 203 and concluded that Section 203 prohibited that loss. This conflict among the lower courts alone justifies the issuance of a writ of certiorari here.

Furthermore, the Court of Appeals' focus on the date of declaration gives improper retroactive effect to the vesting provisions of Section 203 of ERISA. When McCarthy stole property from the Company, whatever interest he may have had in the Plan expired as mandated by Section III(D) of the Plan. The expiration of his interest occurred before January 1, 1976, and, thus, when Section 203 became effective, McCarthy had no right which could be affected by that section. However, the Court of Appeals, by focusing on the date when McCarthy's loss was declared, permitted McCarthy to resurrect his lost interest in the Plan through the filing of a claim in 1976 and thereby gave retroactive effect to ERISA.

It is fundamental that:

> ". . . there is nothing in ERISA indicating any intent to affect the rights of persons whose rights were already determined at some previous date.

Knauss v. *Gorman,* 433 F.Supp. 1040, 1042 (W.D. Pa. 1977), *vacated on different grounds,* 583 F.2d 82 (3rd Cir. 1978). Indeed, Section 203 expressly states that its impact reaches forward, not backward, as it requires that

each plan *"shall provide"* that an employee's right be non-forfeitable. 29 U.S.C. §1053(a). As pointed out in *Morgan* v. *Laborers Pension Trust Fund for N. Cal.*, 433 F.Supp. 518, 524 (N.D. Cal. 1977), "[N]owhere does it state that any ERISA provision shall apply to conduct occurring prior to the dates specified." *See also, Riley* v. *Meba Pension Trust,* 570 F.2d 406 (2d Cir. 1977). But, contrary to all this authority which rejects the notion that ERISA should have retroactive effect, the Court of Appeals permitted McCarthy to resurrect his lost interest by filing a claim.

Moreover, even if ERISA were not expressly prospective in effect, the federal saving statute, 1 U.S.C. §109, and virtually every case which has construed that statute, dictates that rights and liabilities previously determined are not altered by later-enacted federal legislation. For example, in *American President Lines* v. *S. Woolman, Inc.*, 239 F.Supp. 833 (S.D.N.Y. 1964), the court, after reviewing Section 109, held that plaintiff could sue for breach of a contract as long as the contract was valid at the time the breach occurred notwithstanding the subsequent invalidity of the contract due to a later-enacted federal statute. Similarly, in the instant action, McCarthy's Plan interest should not have been affected or revived by Section 203 of ERISA. However, the lower court ignored this conflict as well.

The Court of Appeals attempted to justify its departure from the authorities cited above by characterizing the effect of Section III(D) of the Plan as an "automatic forfeiture" which placed an intolerable burden on employees. (A. 10a and 11a). However, any talk of "forfeiture" is premature until the rights which supposedly were forfeited have been fixed. To fix those rights, reference must be made to the Plan; Section 203 of ERISA only protects, but does not create, rights. Under the terms of the Plan, McCarthy's inchoate Plan interest expired when he stole the Company property. McCarthy, therefore, did not have a right as determined under the Plan which could be forfeited. The Court of Appeals' interpretation of Section 203 alters that determination, even though the determination was made before Section 203 became effective, and necessarily and improperly gives retroactive effect to ERISA. Thus, the lower court's terse explanation for its deviate decision is infirm and the conflicts created by that decision remain unresolved. These conflicts justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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January 29, 1980

APPENDIX

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 78-2630 and 78-2631

ROBERT S. FREMONT and HENRY W. DYBAL,
Plaintiffs-Appellants,

v.

McGRAW-EDISON COMPANY, et al.,
Defendants-Appellees.

ROBERT S. FREMONT, RONALD L. McCARTHY and HENRY W. DYBAL,
Plaintiffs-Appellees,

v.

McGRAW-EDISON COMPANY, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 3766
Honorable JOHN POWERS CROWLEY, *Judge.*

ARGUED MAY 30, 1979—DECIDED SEPTEMBER 27, 1979

Before PELL, *Circuit Judge,* GEWIN, *Senior Circuit Judge,** and WOOD, *Circuit Judge.*

* Senior Circuit Judge Walter P. Gewin of the United States Court of Appeals for the Fifth Circuit is sitting by designation.

PELL, *Circuit Judge*. The three plaintiffs, Robert Fremont, Ronald McCarthy, and Henry Dybal, brought this action against their former employer, the Halo Lighting Division of McGraw-Edison Company (Company), to recover benefits allegedly due them under the Company's Profit Sharing and Retirement Trust (the Plan).[1] The Company had denied them the Plan benefits on the ground that their theft of Company property made them ineligible under the Plan for the benefits. The plaintiffs asserted that Section 203 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1053, prohibited forfeiture of their benefits regardless of their theft. The applicability of § 203 to the plaintiffs was disputed by the Company on various theories. The district court granted summary judgment in favor of McCarthy and against Fremont and Dybal. Both sides appealed.

I.

The facts preceding the dispute in this case are as follows. In June 1959, a profit sharing plan was established for executives and employees of Halo Lighting Products, Inc. In June 1967, Halo was acquired by McGraw-Edison Co. Halo thereafter operated as a divi sion of McGraw-Edison and the Halo profit-sharing plan continued as a separate entity. Halo employed Fremont in 1956, McCarthy in 1961, and Dybal in 1970.

Fremont, who was a Plan trustee for 16 years, left the Company in late 1975 to form his own business. Although the actual date of his resignation is an important issue in this appeal which we will discuss *infra,* it is undisputed that during November 1975, he negotiated a voluntary termination of his employment under which the Company paid him $130,000 and agreed to continue to employ him and pay him a salary at least through the end of 1975.

[1] The plaintiffs also named as defendants the administrator of the Plan and the Plan trustees, but the position of all the defendants is the same and thus we will for convenience refer merely to the Company throughout this opinion.

During October and November of 1975, Fremont and McCarthy, unknown to the Company, stole, among other things, computer printouts, microfilm cards, customer lists, and price lists from the Company, some of which included valuable trade secrets and confidential information. Dybal, who sometime in 1976 also stole Company property, resigned on March 19, 1976, and joined Fremont. McCarthy followed on May 3, 1976. The Company was unaware of the thefts until after all three had resigned.

In July 1976, the Company filed suit in Illinois state court against Fremont and his new company to enjoin them, *inter alia,* from using trade secrets and from raiding Company employees. During the course of that litigation, Fremont for the first time admitted the thefts. After he made these admissions, the parties settled on August 19, 1976, and Fremont repaid to the Company everything he received under the termination agreement, including the salary he received for the period after November 11, 1975, the date of the termination agreement. The settlement expressly left unresolved the question of the plaintiff's profit-sharing benefits under the Plan.

On September 23, 1976, the plaintiffs made written claims for their benefits. These claims were denied by the Company. This action followed. Because the rights of the three plaintiffs are somewhat different under ERISA as a result of different resignation dates, years of service, ect., we will address their claims separately.

II.

The cornerstone of Fremont's claim for the benefits is § 203(a) of ERISA which provides in relevant part:

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

. . . .

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

29 U.S.C. § 1053(a)(2)(A). This provision, Fremont argues, renders invalid Section III(D) of the Plan which states in relevant part:

Dismissal for Cause and Termination of Employment. No part of the share of any of the following participants shall become vested in them: (i) a participant who is discharged by reason of dishonesty, theft, embezzlement, or disclosure of trade secrets or who voluntarily terminates his employment with the Company after having committed such acts.

Clearly, § 203 renders invalid "bad boy" clauses such as § III(D), and the parties before us do not dispute that. The dispute arises over whether Fremont lost his rights to benefits before the effective date of § 203. That section became effective on January 1, 1976.[2]

[2] Section 203 "shall apply in the case of plan years beginning after December 31, 1975." 29 U.S.C. § 1061 (b)(2). The Plan in the present case was on a calendar year basis and thus § 203 applied to it as of January 1, 1976.

Fremont offers two alternative theories by which § 203 would apply to prohibit forfeiture of his benefits under the Plan. First, he argues that § 203 prohibits any forfeiture of benefits after January 1, 1976, and that the forfeiture of his benefits occurred approximately 10 months later when the Company officially denied his claim for the benefits. We cannot agree that the date a former employee is denied his request for benefits is the relevant date for determining the applicability of § 203 if the former employee was not employed after the effective date of § 203. The language of the statute belies such an interpretation. It merely says that effective January 1, 1976, each pension plan shall provide that an *employee's* right to benefits is nonforfeitable. We agree with the district court that § 203 only protects against forfeiture the benefits of those who are in an employee status on January 1, 1976, or thereafter.[3] Fremont nevertheless offers four cases in support of his theory that the date of forfeiture is critical. *Winer* v. *Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979); *Fox* v. *Abrams*, No. CV 77-881-ALS (C.D. Cal. 1978); *Morgan* v. *Laborers Pension Trust*, 433 F.Supp. 518 (N.D. Cal. 1977); *Amory* v. *Boyden Associates, Inc.*, 434 F.Supp. 671 (S.D.N.Y. 1976).

Winer is not persuasive because the plaintiffs-employees denied benefits in that case were not terminated from employment until May 10, 1976, well after § 203 had

[3] Although resort to legislative history is unnecessary when, as here, the language of the statute is clear, we note that the legislative history is consistent with our construction of the statute. Early drafts of § 203 extended the vesting provisions to include "participants," defined in ERISA to include former employees, 29 U.S.C. § 1002(7), but the section which was ultimately enacted is restricted to "employees." *See* Senate Bill S. 4 [Report No. 93-127], 93d Cong., 1st Sess. at 509-514. If Congress had intended § 203 to affect interests of former employees, it would have used the term "participant."

become effective. For this reason, the court does not address the problem of the application of § 203 to employees who resign or are terminated before the effective date of § 203. *Morgan* v. *Laborers Pension Trust, supra,* is also inapposite because it does not involve construction of § 203, the language of which is critical to our conclusion.

Amory v. *Boyden Associates, supra,* also does not directly address the issue which we find dispositive of Fremont's claim, the inapplicability of § 203 to one whose employee status ends before the effective date of § 203. Fremont cites dicta in *Amory* which suggests that the date of forfeiture is the relevant date for determining the applicability of § 203. The court stated:

> Several provisions of the Act are here relevant: § 1144, effective as of January 1, 1975, which preempts State law concerning employee benefit plans; and § 1053 [ERISA § 203], effective January 1, 1976, which provides detailed specificaions which every employee benefit plan must meet and—as of the 1976 effective date—renders void any forfeiture provision such as the one here at issue.
>
> It is at once obvious that nothing in the Act expressly deals with a forfeiture declared in the period between January 1, 1975 (when State law was replaced by Federal) and *January 1, 1976* (*when forfeiture of this nature became outlawed*).

434 F.Supp. at 672 (emphasis added). Although the plaintiff in *Amory* resigned in July 1975, before § 203's effective date, the court did not address, nor apparently did the defendant raise, the theory which we find dispositive. The court denied the company's motion for summary judgment on another theory. The court reasoned that a forfeiture "declared in the period between January 1, 1975 (when State law was replaced by Federal) and January 1, 1976 (when forfeiture of this nature became outlawed)" must be governed by federal

common law. Without the aid of any relevant precent, the court declared the common law to require that forfeiture of vested pension rights be subject to a rigorous reasonableness test which creates a presumption of unreasonableness. *Id.* at 672-73. Even if we assume without deciding that the *Amory* court's analysis is correct, it would not alter our result in the present case because we are of the opinion that § III(D) would withstand a rigorous reasonableness test as applied to the plaintiffs. It is not unreasonable for a company to deny profit-sharing benefits to high level executives who in violation of the Plan admittedly stole valuable customer lists, trade secrets, and other Company property and resigned to establish a competing business. Thus, we are not persuaded by *Amory* because it failed to address the theory we find dispositive and because our result is not inconsistent with the analysis it used.

In *Fox* v. *Abrams, supra,* the plan year began on June 1, so § 203 became effective as to that plan on June 1, 1976. The plaintiffs resigned on May 6, 1976, and June 1, 1976. The court, in an alternative holding, held the forfeitures invalid because they occurred after June 1, 1976, the effective date of § 203. The court did not address the theory which we find persuasive in the present case, and since it probably would have caused a different result as to the employee who resigned on May 6, 1976, we must disagree with the reasoning of *Fox.* The absence of any mention of our theory in the *Fox* opinion suggests that the parties did not raise it and that the court did not *sua sponte* consider it.[4] This leaves open the possibility that the *Fox* court may agree with us when the issue is squarely presented to it. Thus, the four cases offered by Fremont do not persuade us that

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[4] The possibility exists, of course, that the *Fox* court considered the theory we find dispositive but found it to be so unpersuasive that even the briefest discussion of it was unnecessary. We, however, prefer to believe that this possibility did not in fact occur.

the date of forfeiture determines the applicability of § 203 when the plaintiff's status as an employee ended before the effective date of § 203.

Second, Fremont argues alternatively that if the date of employment termination is the relevant date for determining the applicability of § 203, he was employed on January 1, 1976, the date § 203 became effective. The district court disagreed and found that Fremont's employment and participation in the Plan ended at the end of 1975. Our review of the facts does not indicate that the district court erred in this regard. Fremont resigned on November 11, 1975. He stayed on for three more days until his successor was named and then he vacated his office and thereafter performed no other duties for the Company. The November 11, 1975 voluntary termination agreement, upon which Fremont heavily relies, stated: "The Company will retain you as an employee at your current salary rate through January 1, 1976, at which time your employment will terminate." The district court found, however, that the date of January 1, 1976, was used in the termination agreement to assure Fremont that he would qualify for the Company's 1975 contribution to the Plan. The Plan provided that only the Plan shares of persons actively employed by the Company from January 1, 1975 through December 31, 1975 could benefit from the Company's 1975 contribution. Thomas McKay, Jr., general counsel for the Company explained:

> The January 1, 1976 termination date of Fremont's employment which appears on the November 11, 1975 agreement. . . . was suggested shortly before the signing of the agreement by Fremont's counsel to make clear, as Fremont's counsel stated, that Fremont was to be employed by McGraw for the entire calendar year of 1975.

Moreover, as part of the state court settlement, Fremont returned all the money he received from the Company

under the termination agreement, including the salary he received for the period after November 11, 1975. Thus we cannot say that the district erred in finding no material issue of fact regarding Fremont's termination date.[5] For these reasons we affirm the district court's summary judgment against Fremont.[6]

III.

The district court granted summary judgment for McCarthy on the theory that § 203 applied to prohibit forfeiture of his benefits because he was an employee after the effective date of § 203.[7] The Company's appeal asserts several theories. First, the Company argues that even though McCarthy was an employee in 1976, he had no rights in the Plan as of the effective date of § 203 because of his thefts in 1975. Section 203 protects an employee's *right* to his normal retirement benefit, and the Company contends that McCarthy lost any right he had in the Plan when he stole Company property in 1975. Thus, on January 1, 1976, when § 203 became effective, he had no rights to be protected. The Compan's theory is that a participant's interest in the Plan is inchoate and that it vests only when the participant terminates his employment without having committed an act described in § III(D). If the participant commits

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[5] Fremont argues that because the Company had alleged in its state court complaint that Fremont was employed on January 1, 1976, it cannot now deny that allegation. We are unpersuaded by this argument because Fremont denied in his answer to the complaint that he was employed on January 1, 1976.

[6] The Company presented other arguments in rebuttal to Fremont's claim which we need not address since we have affirmed on one theory.

[7] There is no dispute that McCarthy was employed into May 1976, well after § 203 became effective on January 1, 1976.

one of the proscribed acts, the inchoate interest or the prospect of it ever vesting is lost at that time.

We cannot agree with this theory for several reasons. First, even under the language of the Plan, McCarthy's rights in the Plan were not absolutely lost at the instant he committed the thefts. Section III(D) states: "The Individual Trustees, in their sole discretion, shall determine whether a participant was discharged or his employment was terminated under circumstances set forth in this Section III(D) and shall act uniformly with respect to participants." The Trustees did not exercise this discretion until late 1976, well after § 203's effective date. Prior to their exercise of the discretion, it cannot be said that McCarthy's rights in the Plan were definitely lost.[8]

Furthermore, the Company's theory in essence interprets the Plan to work an automatic forfeiture of a participant's benefits. A similar theory was recently rejected by the Eighth Circuit, that court explaining:

> The thrust of the appellants' argument is that there was not forfeiture of vested rights after January 1, 1976, because the rights of Winer and Fingerhut were forfeited "automatically" by the plan terms at the time of their misconduct prior to January 1, 1976. We find little merit to this contention. A forfeiture does not occur immediately by the self-executing operation of a plan provision at the time of an employee's misconduct. Rather, a forfeiture occurs when a pension committee declares the forfeiture by denying the employee's pension claim.

Winer v. *Edison Brothers Stores Pension Plan,* 593 F.2d 307, 312 (8th Cir. 1979). To allow an automatic

[8] The Company argues in response that the Trustees' duty to act uniformly eliminated their discretion to preserve McCarthy's right under the Plan. Although that duty limited their discretion, we cannot agree that it totally eliminated it.

forfeiture to block the application of § 203, especially where the language of the Plan does not expressly provide for it, would be inimical to the purposes of ERISA. The *Winer* court described the evils of automatic forfeitures.

> Automatic forfeitures would place intolerable burdens on employees. They would be required to constantly oversee operations of pension committees in order to protect themselves against abuses and errors that could pass unnoticed. Otherwise, they would risk losing their cause of action years before they applied for pension benefits. . . . Moreover, such a rule would allow pension committees to "bootstrap" themselves into positions where they could rely indefinitely on pre-ERISA conduct to deny pension benefits to employees based on provisions clearly prohibited by ERISA.

Id. We agree with *Winer* and thus conclude that McCarthy did not lose all rights to Plan benefits before January 1, 1976. Thus, § 203 applied to prohibit forfeiture of his benefits.

Our conclusion that McCarthy's rights were not forfeited until the Plan trustees so declared in 1976, and that § 203 therefore applied, is not inconsistent with our conclusions regarding Fremont. We upheld the denial of Fremon's benefits, even though that forfeiture also occurred in 1976, because he was not an employee in 1976. Thus, for § 203 to apply, one must be an employee after its effective date and the forfeiture of one's benefits must occur after its effective date.

The Company also argues that McCarthy is estopped from relying on § 203 because that section applies only because of his concealment of the thefts. That is, if he had disclosed the thefts when they occurred, his Plan benefits very likely would have been forfeited before January 1, 1976, when § 203 became effective. This argument has no merit because it flies in the face of the

purpose of § 203 to prohibit forfeiture of accrued benefits regardless of whether the employee engaged in improper conduct of any kind. Were we to uphold the Company's estoppel theory, it could for decades forfeit employee pension benefits for employee bad acts that occurred prior to the effective date of § 203. This is as violative of legislative intent as is automatic forfeiture discussed *infra. Cf. Winer* v. *Edison Brothers Stores Pension Plan,* 593 F.2d at 312.

The Company, in a counterclaim, asserted its theory that Fremont, a trustee for the Plan for sixteen years through 1975, breached his fiduciary duty imposed by ERISA by not disclosing his and McCarthy's thefts so that the Plan could have retained their Plan shares and reallocated them to other participants' accounts by December 31, 1975. In other words, if Fremont had disclosed the thefts when they committed them, the trustees could forfeited their benefits before the effective date of § 203. The Company also contends that because McCarthy assisted Fremont in this alleged breach of his fiduciary duty by conspiring in the concealment of their thefts, McCarthy is equally liable. The Company thus concludes that McCarthy and Fremont must recompense the Plan for any benefits paid to them. Only McCarthy's benefits are really at issue because Fremont's were properly forfeited for other reasons. However, as we understand the Company's theory, Fremont and McCarthy are jointly responsible for any benefits either might otherwise receive.

The Company's theory in this counterclaim is grounded on §§ 404 and 409 of ERISA, 29 U.S.C. §§ 1104 and 1109. Section 404(a)(1) provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries. . . ." Section 409(a) requires a fiduciary "to make good to such plan any losses to the plan resulting from each such breach [of fiduciary duty] . . ." The district court dismissed the Company's counterclaim for failure to state a

claim on the ground that the Company was trying to reach a result by indirection which contradicts both the letter and spirit of ERISA. We cannot agree. Fremont's concealment of McCarthy's thefts clearly stated a claim for breach of his fiduciary duty.[9] Fremont's brief on appeal appears to confuse or obfuscate the nature of the breach by implying that the alleged breach was the thefts rather than their concealment. Although the thefts were not directly related to Fremont's duties as a trustee, his concealment of those thefts until after the effective date of § 203 directly resulted in a loss of Plan assets.[10] The district court, as previously noted, dismissed the counterclaim on the basis that it was a direct atempt to accomplish that which was not permitted by ERISA. Looking only at the counterclaim against Fremont, however, the remedy under § 409(a) would not be requiring forfeiture of benefits protected by § 203, but rather would be requiring the fiduciary to restore the Plan to the position it would have been in were it not for the breach. In this instance that remedy happens to be measured by McCarthy's benefits. The question is not before us as to whether Fremont would likewise be liable for benefits

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[9] Although there is very little authority interpreting the scope of this fiduciary duty under ERISA, one court has stated that the provisions of § 404(a) "embody a carfully tailored law of trusts, including the familiar requirements of undivided loyalty to beneficiaries, the prudent man rule, the rule requiring diversification of investments and the requiremet that fiduciaries comply with the provisions of plan documents to the extent that they are not inconsistent with the Act." *Eaves* v. *Penn,* 587 F.2d 453, 457 (10th Cir. 1978).

[10] Although the trustees of the Plan had some discretion to grant McCarthy his benefits notwithstanding the thefts, it is quite clear that the thefts would provide a substantial probability that the trustees would exercise their discretion to deny the benefits. This substantial probability is sufficient to create a fiduciary duty in Fremont to disclose the thefts.

received by him as under our holding he will not receive any.

The question may be a close one as to McCarthy's liability under the counterclaim because of his aiding Fremont in a breach of fiduciary duty resulting in benefit to McCarthy; however, on balance we are of the opinion that the counterclaim was correctly dismissed as to McCarthy. While he no doubt benefitted from Fremont's concealment in which he was a participant, the fiduciary duty rested solely on Fremont. We think it is proper to consider, as we have, the separate obligations under the statute which rested on Fremont as a trustee. McCarthy had no such statutorily imposed duty.

We are not saying that in an ordinary civil action against a trustee, others who have aided him, or conspired with him, in a breach of fiduciary duty may not be liable to the extent that they have profited from the breach. *See* Restatement, Second, Trusts § 256. Here, however, McCarthy's act of joining in the concealment, or inaction in non-revealing as the case may be, not arising out of any duty on his part as a trustee cannot, in our opinion, be disassociated from its impact upon legislatively granted rights under § 203. There is too much interrelationship between the two aspects for us to hold otherwise.

We, therefore, reverse the district court's dismissal of the counterclaim as to Fremont and affirm the dismissal as to McCarthy and remand for further proceedings consistent with this opinion.

IV.

The district court granted summary judgment against Dybal, reasoning that his benefits were properly forfeited under either the original Plan or the Plan as amended on September 30, 1976 (Amended Plan). Dybal was an employee for less than six years when he resigned in March 1976. Under § 8.2 of the Amended Plan, which

is consistent with § 203, he was entitled to no benefits because he was an employee for less than 10 years and his accrued benefits were thus forfeitable.[11] *See* 29 U.S.C. § 1202(c); 26 U.S.C. § 411(a)(2)(A); 26 C.F.R. § 1.411-(a)-4(c) example (1). Even though the Amended Plan was expressly made retroactive to January 1, 1976, Dybal argues that there was no forfeiture-for-cause provision in effect when he left the Company because Section III (D) of the Plan had been invalidated by § 203 of ERISA on January 1, 1976, and the Amended Plan had not yet been adopted. A premise of this argument is that the Amended Plan could not apply retroactively to January 1, 1976. The Special Reliance Procedure issued by the Internal Revenue Service and the Department of Labor on November 5, 1975, however, provided that amendments to plans adopted when the Company adopted its Amended Plan (September 30, 1976) which are adopted to satisfy the requirements of, among other sections, § 203, "shall be deemed to have satisfied the requirements of [§ 203]. . . for the entire period from the beginning of the first plan year to which the requirements are applicable to such plan. . . ." Rev. Pro. 76-31, CCH Pension Guide ¶17,-256A. Thus, in the present case, the Amended Plan applied retroactively to January 1, 1976 permitting the Company to deny Dybal his benefits.

Dybal also invokes § 203(c)(1)(A) to argue that § 8.2 of the Amended Plan was not effective as to him. That section of ERISA provides:

> A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the

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[11] Section 8.2 of the Amended Plan provides that if an employee with less than 10 years service commits certain acts, including steading stealing company property and disclosing trade secrets, his entire account balance in the Plan shall become a remainder and he shall not be considered ever to have had any nonforfeitable interest in the Plan.

> requirements of subsection (a)(2) of this section if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

29 U.S.C. § 1053(c)(1)(A). Dybal has not demonstrated, however, that the nonforfeitable percentage of the accrued benefit for any employee under the Amended Plan was less than that under the Plan. Moreover, § 8.2 of the Amended Plan does not affect any nonforfeitable interests. Under § 203 the interests of an employee who has been with the contributor employer less than 10 years may be forfeitable if the plain complies with § 203(a)(2)(A). For these reasons, we affirm the district court's summary judgment against Dybal.

AFFIRMED IN PART; REVERSED IN PART; AND REMAMDED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

In The

UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

ROBERT S. PREMONT, RONALD L. McCARTHY and HENRY W. DYBAL,

Plaintiffs,

vs.

McGRAW-EDISON COMPANY, HALO LIGHTING DIVISION OF McGRAW EDISON COMPANY PROFIT SHARING AND RETIREMENT TRUST, and RAYMOND H. GIESECKE, JOHN LOGAN, EDWARD BLETTNER, EDWARD J. WILLIAMS, DAN T. THOMSON and EXCHANGE NATIONAL BANK OF CHICAGO as Trustees of Halo Lighting Division of McGraw-Edison Company Profit Sharing and Retirement Trust,

Defendants.

No. 76 C 3766

MEMORANDUM OPINION AND ORDER

John Powers Crowley, District Judge

This civil action was brought by three former employees of McGraw-Edison Company to recover certain pension and profit sharing benefits. Plaintiffs, Robert Fremont, Ronald McCarthy, and Henry Dybal assert that their entitlement to these benefits under the Halo Lighting Division of McGraw-Edison Company Profit Sharing and Retirement Trust (Trust)[1] was wrongfully denied in violation of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq.

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[1] On September 30, 1976, the Trust was amended and restated effective January 1, 1976. When discussing the Trust before and/or after amendment, we will refer to the Trust as "original" or "restated".

In response defendants argue that ERISA is inapplicable. Further, defendants assert in counterclaim, that by his wrongful act plaintiff Fremont has breached his fiduciary duty to the beneficiaries of the Trust and that by their actions, plaintiffs Fremont and McCarthy have forfeited any interest they might have had in the trust as well as committed an act of common law fraud against the Trust and its beneficiaries. Before the Court at this time are counter-motions for summary judgment and plaintiff's motion to dismiss the counterclaims.

For the most part, plaintiffs do not contest defendants' characterization of the conduct which according to defendants worked a forfeiture of plaintiffs' pension benefits: the theft by plaintiffs of trade secrets and confidential information from McGraw-Edison which plaintiffs used to establish Juno Lighting, Inc., a competitor of McGraw-Edison. The bone of contention between the parties, rather, is when the forfeiture took place.[2] According to plaintiffs' theory, the forfeiture did not take place until November 5, 1976 when the Trust Committee formally declare the forfeiture. Because the forfeiture occurred ten months after the effective date of Section 203 of ERISA, 29 U.S.C. §1053, which arguably prohibits such forfeitures, the Committee's action was invalid. Defendants respond that by the terms of the Trust, plaintiffs' acts of theft in and of themselves acted to divest plaintiffs of any interest in the Trust. Because these thefts took place no later than November, 1975, two months before the effective date of §203, the forfeiture took place well before the prohibition was effective. According to defendants, on November 5, 1976, the Committee merely

[2] The following discussion involves only the claims of plaintiffs Fremont and McCarthy. As to plaintiff Dybal, there is apparently no dispute as to the applicability of ERISA. Rather the dispute arises over whether the forfeiture of Dybal's benefits fits within the limited range of forfeitures permitted by ERISA. Dybal's claim will be discussed separately.

reaffirmed that the thefts and consequential forfeiture had occurred.

Section 203 of ERISA, 29 U.S.C. §1053, is part of an overall scheme to protect participants and beneficiaries of private pension plans. In furtherance of this goal Congress provided for the nonforfeifability of certain benefits. Among the common practices which Congress sought to eliminate was the forfeiture of benefits accumulated by an employee who later engaged in competitive or other improper conduct. To eradicate these so-called "bad boy" forfeitures, Congress established minimum vesting requirements and prohibited forfeiture of vested benefits.

Section 203 is applicable in the case of plan years beginning after December 31, 1975. 29 U.S.C. §1061(b)(1). A participant whose employment continued into 1976 comes within the aegis of the Act. Conversely, an employee whose employment (and participation in the plan) was terminated before the effective date of Section 203 is not covered. Cf., *Martin* v. *Bankers Trust Co.*, 417 F. Supp. 923 (W.D. Va., 1976) affed 565 F.2d 1276 (4th Cir., 1977). It is true that plaintiffs' cause of action did not technically arise until November, 1976 when they requested and were officially denied payment of their pension benefits by the Trust Committee. *Morgan* v. *Laborers Pension Trust Fund*, 433 F. Supp. 518 (N.D. Calif., 1977). We do not, however, accept plaintiffs' argument that because official recognition of the forfeiture took place after January 1, 1976, Section 203'a prohibition is applicable. Section 203 is effective as to plan years beginning January 1, 1976. If a claimant's interest in the plan is determinative as of a date prior to January 1, 1976, section 203 is inapplicable. Any other result would require an unauthorized retroactive application of the statute. Cf. *Martin* v. *Bankers Trust Co.*, 417 F. Supp. 923 (W.D. Va., 1976), aff'd 565 F. 2d 1276 (1977).

Similarly, we reject defendants' proposition that the forfeiture occurred as of the date plaintiff first engaged

in acts of theft against McGraw-Edison.[3] Vis-a-vis an employee whose employment continues beyond January 1, 1976, this attempt to avoid the minimum vesting requirements of ERISA is ineffective.[4]

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[3] Though defendants' position on this question appears to conflict with this Court's interpretation, we note that in their motion for summary judgment Defendants assert that:

> *Section 203 has no application to Fremont's claim since that Section only protects interests of those employed by the employer contributor to the Plan as of January 1, 1976.* (Defendants' Memo in Response to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Cross Motion for Summary Judgment, p. 2).

[4] This result is true under either the original or restated plan. The original plan provided that the result of wrongful conduct was that "No part of the share of any of the following participants shall become vested in them. . ." This is merely a standard for the vesting of benefits and must comply with the vesting requirements of ERISA. Under the restated plan the language, though different, appears also to set out a vesting requirement. (Section 8-2, Exhibit III) However, even if construed in a different light we seriously doubt the propriety of its application. We find defendants' position that plaintiffs' wrongful and decisive conduct in 1975 is governed by a plan amended in September, 1976, retroactive to January 1, 1976 incongruous and unconvincing.

Further, were we to accept defendants' argument, it would not necessarily result in a forfeiture of plaintiff's benefits. There is authority for the proposition that attempted forfeitures between January 1, 1975 (when state law governing private pension plans was superceded) and January 1, 1976 are subject to a strict standard of reasonableness. *Amory* v. *Boyden Assoc., Inc.*, 434 F. Supp. 671 (S.D. N.Y. 1976). Also, at least one commentator has suggested that all attempted forfeitures after January 1, 1975 are invalid. Lee, *ERISA'S "Bad Boy": Forfeiture For Cause In Retirement Plans*, 9 Loy. Chi. L. J. 137 (1977).

Applying this standard, therefore, the threshold question and the only factual question of significance is when plaintiffs Fremont and McCarthy terminated employment with McGraw-Edison. As to plaintiff McCarthy, the parties do not dispute the fact that plaintiff began employment with McGraw-Edison in 1961 and terminated the relationship on May 3, 1976. ERISA provides that though an employer may defer vesting of benefits until an employee has completed ten years of service, after ten years, an employee must have a 100% nonforfeitable right in his "accrued benefit derived from employer contributions." 29 U.S.C. §1053(a)(2)(A.). Because §203 is applicable to McCarthy, under the minimum vesting requirements of ERISA, McCarthy is entitled to 100% of his accrued benefits.

As to plaintiff Fremont, both parties acknowledge that Fremont's active participation in company affairs ended in November, 1975. However, by the terms of a termination agreement, McGraw-Edison agreed to pay Fremont and employ him "through January 1, 1976." (letter dated November 11, 1975, plaintiff's deposition Exhibit #2). Relying on this agreement plaintiff Fremont concludes that his employment continued into 1976 and is covered by §203 and defendants conclude that Fremont's employment, at the very most, continued only through 1975. There appears to be, at first blush, a genuine issue of material fact precluding summary relief. Rule 56 Fed. R. Civ.P. However, the very terms of the agreement make it clear that the parties intended, that at least technically, Fremont's employment continue through and until the end of 1975—but no longer. Of significance is the language:

> *You* [Fremont] *will not be entitled to any other compensation from the Company except retirement benefits . . . computed to include the contribution to the trusts for the year 1975.*

While we are normally disinclined to grant summary relief where the resolution of a dispute hinges on the par-

ties' intent, it is clear that Fremont intended that his employment and participation in the Trust would end with the benefits accrued in 1975. Those benefits are not covered by §203. Accordingly, plaintiffs' motion for summary judgment is denied and defendants' motion for summary judgment as to plaintiff Fremon is granted.

As to plaintiff Dybal, defendants assert arguments which require an altogether different analysis. Dybal was employed by MrGraw-Edison from November 16, 1970 until March 19, 1976. Defendants argue that because Dybal was employed for less than ten years, forfeiture of his accrued benefits is permitted by ERISA. According to defendants, under Section 8.2 of the restated plan, a participant's entire account balance can be forefeited if the participant commits any one of a number of enunciated acts. Dybal committed such acts in 1976 when he stole trade secrets and other confidential material belonging to McGraw. Again plaintiff does not contradict defendants' characterization of these acts. Plaintiff simply argues that defendant cannot retroactively amend the plan in such a way as to adversely affect his right.[5] 29 U.S.C. §1053(c)(1)(d). Defendants respond that not only was it required that the amendment be retroactive but also that the amendment is valid as it does not have the effect of "changing any vesting schedule" as prohibited by Section 503(c)(1)(A). Further, defendants argue that such a vesting schedule as set out in the restated plan is valid under ERISA §203(a)(A).

We need not reach that issue, however, because we find that under either plan, Dybal's benefits were properly forfeited. Under ERISA all private pension plans must

[5] Plaintiffs position that the retroactive amendment is ineffective as to his claim as a direct contradiction to their earlier position that Dybal is entitled to 60% of his benefits under the restated plan. (Memo of Law In Support of Plaintiff's Motion for Judgment on Complaint and in Support of Motion to Dismiss Counterclaim, p. 10).

meet one of three minimum vesting standards. However, as the Treasury regulations make clear, where a plan provides for a more generous vesting schedule than required by ERISA, to the "extent that rights are not required to be nonforfeitable to satisfy minimum vesting standards . . . they may be forfeited without regard to the limitation on forfeitability required by this section." Treas. Reg. §1.411(a)-4(a). 42 Fed. Reg. 42,326 (Aug. 23, 1977). See Lee, *ERISA's "Bad Boy": Forfeiture For Cause in Retirement Plans,* 9 Loy. Chi. L.J. 137 (1977).

Both the original and restated plans contain a vesting schedule akin to the "ten year full vesting," whereby the employee has a 100% vested interest in accrued benefits after ten years o fservice. Under this type of schedule, vesting can deferred for the first nine years during which time forfeiture is permitted. Under the restated plan McGraw-Edison explicitly provides for this deferment with permissible forfeiture. Under the original plan, because the apparently more liberal or generous vesting schedule is in excess of the minimum required, ERISA does not protect against exercise of the "bad boy" forfeiture. Accordingly, the forfeiture of Dybal's interest was valid.

Finally, plaintiffs move to dismiss the counterclaims for failure to state a claim upon which relief can be granted. In their responsive pleading defendants set out two counterclaims. Count I of the counterclaim seeks equitable relief from Fremont for violation of his fiduciary duties as Trustee of the Trust. Defendants argue that any benefits ultimately recovered by either Fremont or McCarthy are the result of Fremont's failure to reveal the scheme to steal confidential information and Fremont's further failure to declare a forfeiture as to his and McCarthy's interests in the Trust in violation of his fiduciary duty, 29 U.S.C. §1109. Count II appears to allege common law fraud against McCarthy in that by concealing his acts of theft, he fraudulently obtained

the protection of ERISA. Count II also seeks equitable relief.

ERISA provides a private cause of action for enforcement of its requirements. 29 U.S.C. §1132. Under that provision, fiduciaries of a covered pension plan may bring a cause of action seeking an injunction or other equitable relief for violation of the Act or terms of the plan. 29 U.S.C. §1132(a)(3). Though we do not condone the acts of theft perpetrated by Fremon and McCarthy, they were neither violations of ERISA or as to McCarthy, of an enforcible provision of the Trust. We agree with plaintiffs that by their counterclaim, defendants seek to accomplish by indirection a result which contradicts both the letter and spirit of ERISA. Therefore, plaintiffs' motion to dismiss the counterclaims is granted.

Accordingly, plaintiffs' motion for summary judgment is granted in part, denied in part. Plaintiffs' motion is granted as to plaintiff McCarthy and denied in all other respects. Defendants' motion for summary judgment is granted in part, denied in part. Defendants' motion is granted as to plaintiffs Fremont and Dybal and denied in all other respects. Plaintiffs' motion to dismiss the counterclaim is granted.

/s/ John Powers Crowley
John Powers Crowley
United States District Judge

Dated: November 8, 1978.